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SUBJECT: Run-Up to WTO Working Party: Summary of Major U.S. Business Concerns

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REF: HCMC 914

**11.** (SBU) Summary: Summarized below for the convenience of our WTO negotiators are a variety of concerns expressed by U.S. businesses in Vietnam. Most of the complaints focus on trading and distribution issues, including flaws in implementing decrees or draft decrees, the need for greater rights than provided in the BTA, and grandfathering rights under investment licenses. Businesses are also concerned about perceived flaws in pending WTO-related legislation, especially the investment and IPR laws. Finally, there are worries about the GVN's very restrictive interpretation of legal rights, excessive red tape, and, in one case, alleged harassment by GVN authorities.

**12.** (SBU) The U.S. Mission has gathered information from many U.S. businesses in Vietnam about lagging implementation of the U.S.-Vietnam Bilateral Trade Agreement (BTA). We have also heard about concerns that they hope will be addressed in WTO negotiations. While some of these issues have already been reported, others are new and we summarize them here in an effort to compile a complete list.

#### Trading and Distribution Rights

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**13.** (SBU) Exercising BTA rights: The Vietnamese Government (GVN) has not yet issued implementing decrees to give U.S. companies the trading and distribution rights to which they are entitled under the BTA, but in the interim they have assured us in a diplomatic note that they would implement these commitments and provided a point of contact in the Ministry of Trade (MOT). Although initially several U.S. companies reported difficulty in reaching the point of contact, the system is now operating. However, since this diplomatic note was sent no U.S. company has obtained a general license. Colgate-Palmolive was granted licenses only for specific shipments. MOT told Colgate that only companies with "substantial" production and manufacturing activities, which it defines as involving over \$40 million in investment, are entitled to general trading and distribution rights. (Note: Colgate-Palmolive has \$40 million in investment capital registered; we are checking on the GVN criterion. End note.) Carrier Air Conditioning's application was rejected on the grounds that it was registered as a Singapore company. Although the issue is unclear, according to one lawyer, foreign registered subsidiaries of U.S. companies ought to be covered. Cargill also inquired, but said that the MOT seemed unclear about its rights. However, Cargill was not interested in trading and distributing via a joint venture with only 49 percent ownership.

**14.** (SBU) Extending BTA rights: Ford and V-Trac (Caterpillar) also applied for trading and distribution licenses, but were rejected; reportedly because, under the BTA, Vietnam is not yet obligated to provide such rights for automobiles and parts. Ford would like to import some completely built cars to maintain a varied product line while rationalizing its domestic production and achieving economies of scale in Vietnam and other nearby countries. Ford is coping with a relatively small market in Vietnam and the prospect of cheaper imports, including "grey" market Fords (i.e., brought in by Vietnamese traders who have no connection with Ford and offer no warranties), from the ASEAN free trade area. Ford will face more pressure if, as part of the WTO accession process, auto tariffs fall and restrictions on the importation of used cars are lifted. Without trading rights (distribution is currently handled through Vietnamese partners), Ford may have to pull out of Vietnam. GE has also complained that its lack of distribution rights means that it must use a Vietnamese firm to distribute its medical equipment, raising the cost of operating in Vietnam.

**15.** (SBU) Draft decrees unclear: New draft decrees on

trading and distribution rights contain unclear language that could lead to conflicts between the Ministries of Planning and Investment (MPI) and of Trade (MOT) as to whether an investor can acquire distribution rights by amending its investment license from MPI or whether it needs to obtain a separate license from MOT or to do both.

**16.** (SBU) Franchising: Lawyers who have examined drafts of the decree on franchising have expressed concern that each branch of a franchise would have to register individually, with burdensome and repetitive documentary requirements. They have also expressed some concern over a potential conflict between MOT and the Ministry of Science and Technology (MOST) over which ministry would be responsible for issuing licenses. The most recent draft of which we are aware appears to give that responsibility to MOT.

**17.** (SBU) Multilevel marketing: The decree provides that "Foreign individuals or overseas Vietnamese who reside in foreign countries and do not have a work permit issued by a relevant authority in Vietnam" may not participate in multilevel marketing activities. Reportedly, MOT has interpreted this provision to mean that U.S. companies cannot hold even a 49 percent share in multilevel marketing companies, although the BTA allows U.S. firms to hold a 49 percent share in distribution companies after December 2004. The Head of MOT's legal Department recently told Fred Burke privately that no foreign firm would be permitted to engage in multilevel marketing. According to Burke, a lawyer with Baker and MacKenzie, the Vietnamese interpret multilevel marketing not as a way to distribute a service, but as a different service and therefore not covered by the provisions of the BTA. Another concern expressed by analysts of the laws is that the procedures and paperwork required for obtaining a multilevel marketing license will be very burdensome.

#### Services

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**18.** (SBU) The Vietnamese have found some creative ways to limit the rights of service providers under the BTA. U.S. law firms are allowed under the BTA to provide legal services although U.S. lawyers are not allowed to appear in court and only lawyers trained in Vietnam may advise on Vietnamese law. However, Vietnam has now issued a decree distinguishing between lawyers and barristers and forbidding barristers from working for foreign law firms. So now a U.S. law firm cannot conduct litigation by hiring Vietnamese partners to represent them in court.

**19.** (SBU) Financial Services: On the critical issue of branching, it appears that Vietnamese banks are racing to set up their branch networks in advance of any WTO deal that might allow more foreign branches. According to one joint stock bank president, there was to be an increase in the capital requirement for Vietnamese banks in the summer. Vietnamese banks would then have a network with no capital requirements. Also illustrative is a comment by a foreign banker whose firm recently purchased part of a joint stock bank that his firm's strategy was to benefit from being inside of the domestic banking sector for such issues as branching, ATM access, and easier approvals of new products and services.

**110.** (SBU) Telecommunications: In the telecom sector, the limitation on U.S. majority ownership continues to make Vietnam unattractive to U.S. investors. A foreign firm whose ten-year profitable Business Cooperation Contract has just ended in Vietnam expressed frustration with this investment vehicle and emphasized the need for majority ownership in telecom. His firm is considering buying equity in its former partner once it is equitized. The same firm noted that restrictions on distribution prevent it from selling prepaid phone cards, which account for 80 percent of Vietnam's mobile telephone market. On signal piracy, the Ministry of Posts and Telematics has taken note of the issue. The Cable Association in Asia has taken up the signal piracy issue and plans a visit to Hanoi this fall to pursue it. HBO launched its channels through cable in Vietnam this week and remarked that HBO and others in the industry were reluctant to put anything into Vietnam because of the dominance by pirates.

#### Investment Law

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**111.** (SBU) A number of foreign experts have expressed strong concern about the proposed new investment law. Several years ago, the GVN eased the requirements for domestic firms to start new businesses, changing from a licensing procedure involving scrutiny and review by government authorities to a simple registration procedure, except in sensitive sectors. Foreign firms still have to undergo the more complicated licensing procedure. The new Investment and Enterprise Laws would equalize legal conditions for domestic and foreign

firms by re-imposing strict licensing requirements on domestic firms. One lawyer believes that the Investment Law language could be interpreted to require a firm to obtain a license for each and every new investment, a major step backwards. In the rush to pass WTO-related legislation, some observers fear that there may not be time to fix all the problems with the law.

IPR  
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¶12. (SBU) Both legislation and enforcement continue to be inadequate. A representative of the Business Software Alliance told Econoff that the latest draft of the IPR law was an improvement, but is still far from meeting international norms. He urged the USG to stress the importance of getting the IPR legislation right. An Anheuser-Busch representative was concerned about a provision on protection of trademark holder's rights against a later filed geographic indication, but indicated that he believes that the issue may be resolved in the latest draft.

General Concerns

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¶13. (SBU) Red tape: Many of the new laws, including those mentioned above, also impose burdensome registration, review or licensing provisions. For example, the GVN now proposes to reintroduce a requirement for representative offices to reregister every year, instead of every three years. Under the Competition Law, every contract by a company with more than 30 percent market share that contains one of a number of potentially suspect terms and every merger that might result in a company with more than a 30 percent market share must be reviewed at the ministerial level. The MOT has the responsibility for many of these new licensing or registering requirements, but lacks the institutional capacity to review a large number of applications quickly and efficiently.

¶14. (SBU) Strict interpretation: A number of American companies and lawyers report being told by government contacts that, particularly during the current period of WTO negotiations, the Government is doing no more than is necessary under the narrowest possible interpretation of the BTA and other laws.

¶15. (SBU) For example, according to Baker and Mackenzie lawyer Fred Burke, the MOT takes the position that since Annex G of the BTA only refers to "joint ventures and enterprises with 100 percent foreign owned capital," which are provided for under the Law on Foreign Investment, U.S. companies can only operate as those two forms of organizations. However, in 2006, the GVN plans to eliminate the Law on Foreign Investments, and the new Unified Enterprise Law does not provide for joint ventures or enterprises with 100 percent foreign owned capital. If the MOT persists in this interpretation, U.S. companies could be left without any legal basis to obtain their rights. Burke suggests that the best way to fix this problem for BTA purposes would be amend Annex G to include other forms of business enterprises.

¶16. (SBU) Harassment: One company, Tahitian Noni, a well-connected Utah-based firm that exports \$400 million annually, has come to us to complain of harassment by GVN authorities. The company distributes its U.S.-manufactured products via a Vietnamese partner, Noni Vina, through multilevel marketing. In late spring, the firm's products were portrayed as unhealthy by a Vietnamese journalist. For the past several months, Noni Vina's offices have been under investigation by a multi-agency GVN team that has been extremely disruptive of the company's operations. The team has, inter alia, demanded prior approval of all internal Noni Vina communications such as newsletters and arbitrarily disallowed tax deductions for seemingly legitimate expenses. GVN authorities are threatening not to allow Noni Vina to deduct the cost of sales commissions and to ban one of Tahitian Noni's products because it contains slightly less sodium than listed in its registration documentation. Either action would put Tahitian Noni out of business in Vietnam. Tahitian Noni reported a 60 percent drop in revenues as a result of the situation. The company and its Vietnamese partner employ about 20 full time personnel and about 6,000 part time distributors. According to Fred Burke, other U.S. and foreign direct marketing firms (such as Forever Living) have also been subjected to similar treatment.

¶17. (SBU) Grandfathering existing trading and distribution rights: Investment licenses granted to some U.S. companies may contain provisions that provide rights beyond those guaranteed by the BTA. However, if companies are compelled to apply for new licenses, which they must do every time they change their business operations, they may lose advantageous provisions of their old licenses. For example,

Otis had trading and distribution rights beyond the rights provided in the BTA. Some market research companies and insurance companies have investment licenses allowing them to have 100 percent foreign ownership, where under the BTA they are limited to joint ventures. Some U.S. businesses have argued for "grandfathering" old investment licenses.

18. (SBU) SPS: The Vietnamese firm that will distribute Estee Lauder cosmetics in Vietnam had to postpone its July opening as a result of various complications. The greatest hurdle is an apparent requirement from the Ministry of Health that each individual product be tested and registered separately. According to the local representative, there are 500 products involved so that this would greatly hinder operations. Another foreign firm that produces and sells food products in Vietnam has had approval difficulties with the MOH for some time, but generally works them out through personal connections. Tahitian Noni (see above) is facing a threat to ban one of its products because its sodium content is slightly below the amount listed in its registration documents.

Tariff Issues

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19. (SBU) Our FAS representative has brought to our attention the need to win reductions in the tariff on whey. This is an important ingredient for both feed and food. The Vietnamese continue to hold out for a 20 percent final bound tariff, whereas the United States is asking for a 5 percent final tariff. Vietnam has a growing dairy industry but will continue to fall far short of fulfilling its dairy needs domestically. Nonetheless, the Vietnamese industry wants to maintain a high tariff to keep domestic prices high. Given the structure of the U.S. industry, whey is an important U.S. export. Lower tariffs are also in the interest of Vietnam's livestock and food manufacturing sectors, as they need cheap access to this important ingredient. Rapidly developing the livestock sector with lower whey tariffs would help boost U.S. exports of corn, soybeans and other feed ingredients.

MARINE